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HAROLD B. WILLEY, Clerk

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 387

GRAFTON MAHONEY,

Appellant,

vs.

THE PAROLE BOARD OF THE STATE OF NEW JERSEY

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW JERSEY

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

THEODORE D. PARSONS,
Attorney General of New Jersey;
EUGENE T. URBANIAK,
Deputy Attorney General,
Counsel for Appellee.

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SUPREME COURT OF THE UNITED STATES

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No. 387

GRAFTON MAHONEY,

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vs.

THE PAROLE BOARD OF THE STATE OF NEW JERSEY

STATEMENT IN OPPOSITION TO APPELLANT'S STATEMENT OF JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

The appellee in the above entitled cause for its statement in opposition to appellant's statement as to jurisdiction herein, and in support of appellee's motion to dismiss or affirm, respectfully shows the following:

I. Statement of Issues on Appeal

The question sought to be presented in this appeal is appellant's claim that the Parole Law of the State of New Jersey, Chapter 84, P.L. 1948, is repugnant to the 14th Amendment of the Constitution of the United States in that, within certain sections thereof, the law denies to all persons

or classes of persons the equal protection and due process of the law.

Appellant attacked the constitutionality of the statute involved in the courts of New Jersey and our Supreme Court determined that no repugnancy existed with respect to the 14th Amendment of the United States Constitution. The opinion of the said court appears in Appendix A of appellant's statement as to jurisdiction.

Appellant was convicted in the courts of New Jersey on five separate counts and there were imposed upon him five consecutive sentences, four of which were for a minimum of three years and a maximum of five, and the fifth with a minimum of two years and a maximum of three years, all convictions relating to breaking and entering and possession of burglar tools. Appellant has completed service of the maximum on the first four sentences, less credits allowed by law in reduction thereof, and is now serving the maximum of the fifth sentence.

He is a fourth offender in contemplation of the Parole Act of New Jersey, for, by his own admission, he has, on three or more prior occasions, been confined in institutions of state prison character in New Jersey or in other jurisdictions under circumstances described in Section 12(c), Chapter 84, P.L. 1948, Laws of New Jersey, the substance of which is as follows:

> "(c) Any person sentenced to any penal institution of this State who has previously served all or part of three terms of imprisonment in any penal institution
>
> (1) of this State, of the United States, or of any state other than this State, or
>
> (2) Of this State and the United States, or of this State, the United States and any other state, or of this State and any other state or states, or
>
> (3) Of the United States and any other state or states, or of more than one state other than this State,

shall be deemed to be a fourth offender and upon his incarceration for such fourth or later offense shall be ineligible for parole consideration by the board until he shall have served the maximum sentence imposed upon him for such fourth or later offense less any time earned for diligent performance of work assignments; subject, however, to the provisions of section thirteen of this act.

As used in this section 'penal institution' means and includes the New Jersey State Prison and any other State penal or correctional institution in this State to which offenders are sentenced for fixed terms or fixed minimum and maximum terms and other institutions of like character under the jurisdiction of the United States or of a state or states other than this State."

Appellant has been denied consideration for release on parole by the appellee for he clearly comes within the category of recidivists defined in the aforesaid section.

Appellant complains that he has been denied the protection afforded by the 14th Amendment to the United States Constitution and asserts that other fourth offenders, *i.e.*, those serving sentences of life and those serving sentences in county penitentiaries, are not subject to the provisions and limitations of Section 12(c), Chapter 84, P.L. 1948.

Section 11, Chapter 84, P.L. 1948, contains the following:

"Any prisoner serving a sentence of life shall be eligible for consideration for release on parole after having served 25 years of his sentence, less commutation time for good behavior and time credits earned and allowed by reason of diligent application to work assignments."

Section 35, Chapter 84, P.L. 1948, relating to prisoners in confinement in county penitentiaries, reads as follows:

"Notwithstanding any of the provisions of this act, any prisoner in a county penitentiary serving a term having a maximum greater than a year and who has

served at least one year of such term shall be permitted to make application to the board for parole * * *."

II. The Question Presented

The question presented by this appeal is:

Is the appellant, a fourth offender serving a series of consecutive sentences, each having a specified minimum and maximum number of calendar years, in the same "Class of persons" as a fourth offender serving a sentence of life without a definitely ascertainable minimum or maximum, or a fourth offender serving a sentence in a county penitentiary wherein prisoners convicted of minor offenses are confined?

III. No Substantial Federal Question Is Presented by the Attempted Appeal

Parole is no part of the sentence imposed by the criminal court. It is a privilege extended the prisoner in the discretion of the Parole Board and partakes of clemency or grace. It is a matter for regulation by the individual states. In *Ughbanks v. Armstrong*, Mich. 1908, 28 S. Ct. 372, 208 U. S. 481, 52 L. Ed. 582, the United States Supreme Court had this to say:

> "If a State choose to grant this privilege to make application to the Governor for discharge upon parole in the case of one class of criminals and deny it to others, such, for instance, as those who have been twice convicted of a felony, it is a question of State policy exclusively for the State to decide, as is also the procedure to ascertain the fact, as well as the kind or amount of evidence upon which to base its determination. It is not bound to give the convict a hearing upon the question of prior convictions, and a failure to give it violates no provision of the Federal Constitution."

The Legislature of New Jersey in establishing the Parole Act has attempted to discourage recidivism by withholding

parole consideration to subsequent offenders until they shall have served a percentage portion of their maximum sentence. Second offenders must serve one-half thereof, third offenders three-quarters and, as demonstrated, fourth offenders are denied parole consideration (Section 12(a), (b) and (c), Chapter 84, P. L. 1948). Obviously, it is impossible to compute a percentage portion of the maximum of a life sentence for the maximum on such a sentence is the duration of the natural life of the individual. Because of the impossibility of calculating such percentage portion, the Legislature, desiring to provide some basis for the paroling of life sentence prisoners, decreed that it should be 25 years less credits for work performed and for good behavior. The maximum credits will yield a minimum on a life sentence of approximately 15 years. If such provision did not appear in Section 11, Chapter 84, P. L. 1948, there would be no basis upon which a life sentence prisoner could receive parole consideration and, accordingly, the mandate imposed upon the Legislature by the New Jersey Constitution, which directs that "A system for the granting of parole shall be provided by law" (Art. V, Sec. II, Par. 1 and 2), would not be met.

Accordingly, a fourth offender serving a life sentence and a fourth offender serving one or more sentences having a minimum and a maximum term of years, are not in the same "Class of persons". The "Class" commonly referred to as fourth offenders is subject to further subdivision to accommodate, in addition to the appellant's category, those persons serving life sentences and, additionally, those confined in county penitentiaries, who are also fourth offenders.

Appellant makes much of the fact that, whereas a fourth offender life sentence prisoner is eligible for parole consideration at 15 years, assuming maximum credits, appellant is required to serve approximately 23 years in con-

finement which represents the adjusted maximum on each of a series of five consecutive sentences. We feel this argument to be completely without merit for it is the sole and exclusive function of the Legislature to determine the punishment that shall be meted out for conviction of crime or a series of such convictions.

Had appellant been given a single sentence of three to five years or had the court imposed all five sentences to run concurrently, rather than consecutively, the argument advanced by the appellant would serve him not at all. He would have long since completed his maximum and would have been at liberty.

Appellant cannot urge that he is denied liberty by the application of the New Jersey Parole Law. There is no guarantee to him that he will be released if considered for parole for that decision rests in the sole discretion of the paroling authority, the appellee.

Appellant is obliged to place himself squarely within the 14th Amendment of the United States Constitution and is required to demonstrate that he is a member of a "Class of persons" that is denied the equal protection of some law which favors another individual of the same class over him. Appellant seeks to establish a "Class of persons" consisting of fourth offenders defined in Section 12(c), Chapter 84, P. L. 1948. He fails for the class is subject to further subdivision. If appellant could show that any fourth offenders serving a series of minimum-maximum sentences are given more favorable treatment under the Parole Law, then he would have met the burden of proof. He has not done so nor are the facts and the law capable of such demonstration.

A prisoner released on parole in New Jersey must remain under parole supervision until the expiration of the maximum of his sentence. A condition of his parole provides that if he is again convicted of crime that he shall be re-

quired, in addition to the most recently imposed sentence, to serve the balance remaining on the maximum of the sentence upon which he was paroled (Chap. 84, P. L. 1948, Sec. 24).

Parole is merely an extension of prison limits. It is not a termination of sentence. A life sentence prisoner on parole remains under the legal custody of the chief executive officer of the institution from which paroled until the expiration of maximum (Chap. 84, P. L. 1948, Sec. 15).

Such parole may be revoked for conviction of crime of a lesser nature and confinement under the life sentence is resumed. Such is not the case with the appellant for upon completion of the maximum on each of his consecutive sentences he is free to go where he chooses, is not required to report to a parole officer and may change his place of residence at any time, all of which privileges are denied the life sentence prisoner on parole. The appellant may marry or secure a driver's license without the consent of the paroling authority; not so with the life sentence parolee.

Appellant relies on *McPherson* v. *Blacker*, 146 U. S. 1, where this Court said:

> "The inhibition that no state shall deprive any person within its jurisdiction of the equal protection of the laws was designed to prevent any person or *class of persons* from being singled out as a special subject for discriminating or hostile legislation." (Emphasis supplied.)

We are satisfied that this represents a fair and accurate statement of the applicable law but are obliged to reject appellant's theory that he, as a fourth offender, is in the same "Class of persons" as a fourth offender serving life nor is he in the same "Class" with a fourth offender serving a sentence in a county penitentiary, which, under the law of New Jersey, cannot exceed 18 months (N. J. S. A.

2:192-3), and reference to which is made in Section 35, Chapter 84, P. L. 1948.

It is not the intention of the Legislature to remove county penitentiary prisoners from the operation of Section 12(c), Chapter 84, P. L. 1948, but rather to remove them from the limitation found in Section 17 of the Parole Law which provides that consideration for release on parole shall be solely upon the initiative of the appellant and "No application for parole made by a prisoner, or on his behalf, shall be considered by the board".

Because of the short duration of county penitentiary sentences and because the appellee is precluded from granting parole to any such prisoner prior to service of at least one year of his sentence (Sec. 35, *supra*), the Legislature deemed it advisable to place the burden upon the county penitentiary prisoner to apply for parole rather than require the appellee to examine hundreds of cases upon its own initiative, a very small percentage of which would result in parole action.

Appellant observes that he would have been considered more favorably by appellee had there been imposed upon him a life sentence as he alleges is mandatory under the Habitual Offender Law of New Jersey (R. S. 2:103-10). There is no such requirement, after indictment, trial and conviction as a fourth offender, that New Jersey courts impose a mandatory life sentence. The statute was construed in the matter of *In re Caruso*, 131 N. J. L. 505, where Mr. Justice Porter said:

> "This statute vests discretionary power in the trial court to impose life sentence on an habitual criminal, which is defined as any one convicted of a fourth high misdemeanor and where the accused has been sentenced on each of the first three counts to the State Prison and has served the sentences or a part thereof." (Aff. 135 N. J. L. 522, N. J. Supreme Court 1944.)

Statutory enactments will not be considered constitutionally invalid as special or class legislation merely because they affect one class and not another, provided that they affect all members of the same class alike. (*Youngquist* v. *City of Chicago*, 1950, 90 N. E. 2d 205, 405 Ill. 21.) In *Ballantine* v. *Nester*, 1942, 164 S. W. 2d 378, 350 Mo. 58, it was determined that for a statutory classification to become obnoxious to the 14th Amendment, United States Constitution, the selection must not be merely possibly, but clearly and actually, arbitrary and unreasonable.

The statutory scheme of parole legislation in New Jersey, requiring recidivists to remain longer in confinement without parole consideration, does not permit of the treatment of fourth offender life sentence prisoners in the same class as fourth offenders serving minimum-maximum sentences. Thus, the Legislature in order not to deny parole consideration to such a life sentence prisoner, irrespective of habitual offender status, has decreed that they shall constitute a class and each shall serve 25 years in confinement less time credits in reduction thereof for good behavior and work performed. The distinction is reasonable, under the circumstances necessary, and in no sense arbitrary or discriminatory as proposed by the appellant.

IV. The Authorities Relied upon by the Appellant Do Not Serve Him But Support the Position of the Appellee

Reference is made to McPherson v. Blacker, supra, relied upon by the appellant. Appellant apparently inadvertently omitted the next succeeding paragraph of the opinion of the court at page 12 in 13 Sup. Ct. Rep., which is of considerable interest and which reads as follows:

> "In Hayes v. Missouri, 120 U.S. 68, 71, 7 Sup. Ct. Rep. 350, Mr. Justice Field, speaking for the court, said 'The Fourteenth Amendment to the Constitution

> of the U. S. does not prohibit legislation which is limited either in the objects to which it is directed or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike, *under like circumstances and conditions*, both in the privileges and in the liabilities imposed. * * * Class legislation, discriminating against some and favoring others, is prohibited, but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons *similarly situated*, is not within the amendment. 113 U.S. 27, 32, 5 Sup. Ct. Rep. 357'." (Emphasis supplied.)

We believe that appellant is not "similarly situated" with fourth offender life sentence prisoners and further that he is treated exactly as every fourth offender minimum-maximum sentence prisoners "under like circumstances and conditions".

Appellant relies on *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61, 31 S. Ct. 337, 55 L. Ed. 369, and it is unfortunate that he did not set out at length from the opinion of the court at page 377, 55 L. Ed. relating to the contention that certain legislation establishes arbitrary classifications and consequently denies the equal protection of the laws to those whom it affects. Therein Mr. Justice Van Devanter said:

> "The rules by which this contention must be tested, as is shown by repeated decisions of this court, are these:
>
> 1. The equal-protection clause of the 14th Amendment does not take from the state the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that

regard, and avoids what is done only when it is without any reasonable basis, and therefore is purely arbitrary.

2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety, or because in practice it results in some inequality.

3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed.

4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary."

Appellant fails to carry the burden imposed upon him by these rules viewed in the light of the conditions which required the New Jersey Legislature to exercise validly its police power.

Appellant relies on *McLean* v. *Arkansas*, 211 U.S. 539, 29 S. Ct. 206. The court made this observation at page 319, 53 L. Ed.:

"While the courts can set aside legislative enactments upon this ground, the principles upon which such interference is warranted are as well settled as is the right of judicial interference itself.

The legislature, being familiar with local conditions, is, primarily, the judge of the necessity of such enactments. The mere fact that a court may differ with the legislature in its views of public policy, or that judges may hold views inconsistent with the propriety of the legislation in question, affords no ground for judicial interference, unless the act in question is unmistakably and palpably in excess of legislative power."

In *Louisville and Nashville RR* v. *Stockyards Co.*, 212 U.S. 133, 144, 29, S. Ct. 246, it was said:

> "The law itself must save the party's rights and not leave them to the discretion of the courts as such."

We fail to observe how this legal principle, accurate as we concede it to be, applies to the appellant, for certainly none of his rights have been adversely affected by the exercise of discretion of the New Jersey courts for, as a fourth offender serving minimum-maximum sentences, he was denied the privilege of parole in clear, unmistaken and unambiguous language, all of which was fortified by his own admission that he was so convicted on prior occasions as to bring him within the category of a fourth offender in contemplation of the New Jersey Parole Act.

Lanzetta v. *State of New Jersey*, 306 U.S. 451; 59 Sup. Ct. 618, has no application to these proceedings for it was grounded solely on lack of due process because the statute was ambiguous and failed to give proper notice to a defendant of the basic elements of the crime with which he was charged. Since the appellant does not advance in his statement of jurisdiction any argument pertaining to denial of due process, we must assume that he restricts his presentation of the issues here to the sole question of denial of equal protection of the laws, an element completely lacking in the Lanzetta decision.

Zucht v. *King*, 260 U.S. 174; 43 Sup. Ct. 24, is authority for the proposition that it is within the police power of a state to require compulsory vaccination of children attending public and private schools, and, further, that the United States Supreme Court will not intervene in a situation where, although the constitutionality of a state law is drawn in question, no substantial constitutional question is presented, as we aver is the circumstance in this attempted appeal.

Yick Wo v. *Hopkins*, 118 U.S. 356; 6 Sup. Ct. 1064, makes no reference to denial of equal protection of the laws but confines itself to denial of due process and decides that a municipal ordinance which denies due process will be declared invalid by the United States Supreme Court. There can be no quarrel with this proposal, but the facts are so entirely dissimilar as to render the case inapplicable to the matter sub judice.

V. Appellant Does Not Confine Himself to the Record Below

At page 10 in the appellant's statement, he endeavors to persuade this honorable Court that the recent prison disorders in the State of New Jersey, as well as those in other states of the Union, can be attributed directly to inadequate or discriminatory parole systems. The statement is purely conjectural and barren of factual basis in this or any record for the committee appointed by the Governor of New Jersey to study the prison problem has made no report. We respectfully submit that this appeal must be decided on its merits in the light of applicable decisions and the facts adduced herein, rather than upon sheer speculation.

VI. The Opinion Below

The opinion of the Supreme Court of New Jersey is set out at length as Appendix "A" of appellant's statement. Further elaboration thereon would serve no useful purpose, save to comment that we believe that the decision is manifestly correct, gives consideration to all constitutional rights of appellant and determines properly that the New Jersey Parole Law is in no sense repugnant to the 14th Amendment to the United States Constitution. The law establishes no classifications which may be said to be arbitrary, discriminatory or unreasonable but merely recog-

nizes and treats impartially with subdivisions in the general category of fourth offender prisoners, favoring none over the other.

Conclusion

We respectfully submit that the appellant has failed to carry the burden of proof imposed upon him by the decisions in that he cannot demonstrate that his classification as a fourth offender minimum-maximum sentence prisoner does not rest upon reasonable basis; and, we further submit that no substantial question is presented by this appeal which entitles appellant to invoke the jurisdiction of the Supreme Court of the United States.

WHEREFORE, appellee respectfully moves that the within appeal be dismissed or that the judgment and decree of the Supreme Court of the State of New Jersey be affirmed.

THEODORE D. PARSONS,
Attorney General of New Jersey,
Counsel for Appellee.

EUGENE T. URBANIAK,
Deputy Attorney General,
Of Counsel.

APPENDIX "A"

Statutes Involved

The statute under consideration is Chapter 84 of the Laws of New Jersey of the 1948 Session and specifically Sections 11, 12(a), (b) and (c), 15, 17, 24 and 35.

Those pertinent sections not recited at length in the main statement are set forth herein:

Section 12(a) and 12(b), Chapter 84, P.L. 1948.

The granting of parole, as provided for herein, shall be limited as follows:

(a) Any offender sentenced to any penal institution of this State who has previously served all or part of a term of imprisonment in any penal institution

(1) Of this State, or
(2) Of the United States, or
(3) Of any state other than this State,

shall be deemed to be a second offender and upon his incarceration for such second offense shall be ineligible for parole consideration by the board until he shall have served at least one-half of the maximum sentence imposed upon him for such offense less any time earned for diligent performance of work assignments; subject, however, to the provisions of section thirteen of this act.

(b) Any person sentenced to any penal institution of this State who has previously served all or part of two terms of imprisonment in any penal institution

(1) Of this State, of the United States or of any state other than this State, or

(2) Of this State and of the United States, or of this State and of any other state, or of the United States and any other state, or of any states other than this State,

shall be deemed to be a third offender and upon his incarceration for such third offense shall be ineligible for parole consideration by the board until he shall have served at least three-fourths of the maximum sentence imposed upon him for such third offense less any time earned for diligent performance of work assignments; subject, however, to the provisions of section thirteen of this act.

Section 15, Chapter 84, P.L. 1948.

If the board shall determine that a prisoner is eligible for parole then he may be released, upon such terms and conditions as the board shall prescribe, but while on parole shall at all times remain in the legal custody of the warden, keeper or chief executive officer of the institution from which he is paroled, and under immediate supervision of the Division of Parole of the Department of Institutions and Agencies in accordance with the rules of the board, until the expiration of the maximum sentence prescribed by law for the crime for which he was committed.

Section 17, Chapter 84, P.L. 1948.

The release of a prisoner on parole shall be solely upon the initiative of the board and no application for parole made by a prisoner, or on his behalf, shall be considered by the board. The warden, keeper or chief executive officer of any penal or correctional institution referred to in this act shall permit all prisoners to forward uncensored mail to the board. It shall be the duty of the board to maintain a record of the dates upon which each prisoner shall first be eligible for parole consideration as provided in section nine hereof. On or before such date, in the case of each prisoner, it shall further be the duty of the board to consider the case of each such prisoner for parole and to cause to be brought before it all information regarding the prisoners referred to herein. Prior to considering any such case, the board shall give public notice of the name of the prisoner, and the county from which and crime for which, he was committed. The Division of Parole shall furnish the board with a report and

evaluation of the factors relating to the community parole plan required herein.

Section 24, Chapter 84, P.L. 1948.

A prisoner, whose parole has been revoked because of conviction of a crime committed while on parole, shall be required, unless sooner reparoled by the board, to serve the balance of time due on his sentence to be computed from the date of his original release on parole. If parole is revoked for reasons other than subsequent conviction for crime while on parole then the parolee, unless sooner reparoled by the board, shall be required to serve the balance of time due on his sentence to be computed as of the date that he was declared delinquent on parole.

Additional Applicable Statutes Referred to in Statement

R.S. 2:192-3.

Every person sentenced under the laws of this State to imprisonment for any time less than one year shall be confined in the common jail of the county where conviction was had, or the county workhouse or penitentiary, in the discretion of the court, and there safely kept until the term of his confinement shall expire and the fine and costs of prosecution be paid, or until he shall be discharged by due process of law; provided, in counties of the first class no sentence exceeding six months shall be made to the common jail of the county. Every person so sentenced to the county workhouse or penitentiary shall be transferred to and confined therein within ten days after the sentence.

Every person sentenced to hard labor or imprisonment, except as hereinafter provided, for any term of one year or longer shall be imprisoned in the State Prison; except that in any county in which a penitentiary is located, a person sentenced to hard labor and imprisonment for a term of not less than one year and not exceeding eighteen months, shall be imprisoned in the penitentiary of such county instead of the State Prison, unless the person so convicted shall have previously served a term in the State prison, in which case the person so convicted may, in the discretion of the court,

be imprisoned in the State Prison; provided, nothing herein contained shall be construed to prevent the sentence of persons to penitentiaries in counties of the first class to terms of between six months and one year.

In any county in which a workhouse is located, any person sentenced to hard labor and imprisonment for a term of not less than one year and not exceeding eighteen months, may, in the discretion of the court so sentencing, be imprisoned in such county workhouse instead of the State Prison or county penitentiary.

R.S. 2:103-10.

Any person who on three separate occasions has been convicted of high misdemeanors in this State, or of crimes under the laws of the United States or of any other state or country, which crimes would be high misdemeanors if committed in this State, or whose convictions for such offenses in this State or under the laws of the United States or of any other state or country shall total three or more, and who shall thereafter be convicted of a subsequent offense enumerated in this subtitle, is hereby declared to be an habitual criminal, and the court in which such fourth or subsequent conviction is had, shall impose a life sentence in the State Prison upon the person so convicted.

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SUPREME COURT OF THE UNITED STATES

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THE PAROLE BOARD OF THE STATE OF NEW JERSEY

REPLY TO STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

In Respondent's Statement opposing jurisdiction, the State concedes that fourth offenders serving life sentences under Section 11 and fourth offenders committed to County penitentiaries under Section 35 receive parole consideration while fourth offenders sentenced to the State Prison under Section 12(c) receive none. To justify such discrimination, Respondent argues (p. 4):

> "The Legislature of New Jersey, in attempting to establish the Parole Act, has attempted to discourage recidivism by withholding parole consideration to subsequent offenders . . . and under Section 12(c) . . . the Legislature of New Jersey created the

classes and prescribed the parole rights as to first, second, third and fourth offenders."

For the same purpose, Respondent argues (p. 5):

> "If such provision did not appear in Section 11 . . . there would be no basis upon which a life sentence prisoner *could receive parole consideration* and, accordingly, the mandate imposed upon the Legislature *by the New Jersey Constitution*, which directs that 'A system for the granting of parole shall be provided by law' . . . *would not be met.*" (Italics supplied.)

If the constitutional mandate to the Legislature was to create "a system for the granting of parole" and would have failed to meet this duty by denying fourth offenders serving life sentences parole consideration, then to an even greater degree the Legislature has failed to fulfill the mandate by denying such consideration to fourth offenders who are committed to the State Prison serving sentences of less than life.

The operation of this statute as applied under Respondent's admission would enable a fourth offender serving life to be paroled at the expiration of 15 years, whereas Petitioner is bound to serve the maximum of his consecutive sentences of 23 years.

There is no real or substantial distinction between fourth offenders serving life sentences under Section 11 and fourth offenders serving sentences less than life under Section 12(c). Their status is the same. Both are fourth offenders. Both are committed to the State Prison. The only possible difference is that of length of servitude. Despite the avowed legislative objective to give less parole consideration to the more offending recidivist, this law as applied favors the greater offender with parole consideration and gives the lesser offender none.

To justify the patent discrimination between fourth offenders serving terms in the County penitentiaries who received parole consideration under the statute and those serving terms in the State Prison who received none, Respondent argues (p. 8):

> "It is not the intention of the Legislature to remove County penitentiary prisoners from the operation of Section 12, paragraph c . . . but rather to remove them from the limitation found in Section 17 of the Parole Law which provides that consideration for release on parole shall be solely upon the initiative of the Appellant and 'no application for parole made by a prisoner or on his behalf shall be considered by the Board'."

This statement is erroneous because Section 35 provides, inter alia:

> "Notwithstanding *any* of the provisions of this Act, *any* prisoner in a County penitentiary . . . shall be permitted to make application to the Board for parole." (Italics supplied.)

and it is obvious that all of the provisions of the statute are excluded, including Section 12.

This argument falls for another reason. If Petitioner had been committed to a County penitentiary under sentence of 18 months or less, he would have been entitled to parole consideration under Section 35 *despite his status as a fourth offender.*

Under Chapter 153, P. L. 1945 (New Jersey Statutes Annotated, Title 2:192-3), the type of crime is not a relevant factor, but it is the sentence of the Court which is determinative of the place of incarceration. (The statute in question is quoted in extenso at page 8 of Petitioner's Statement as to Jurisdiction.)

Finally, Respondent argues (p. 9) that a valid and reasonable "distinction" exists between fourth offenders serving life sentences and fourth offenders committed to the County penitentiaries who received parole consideration and fourth offenders committed to State Prisons who received none. This argument is without merit. Respondent concedes that it was the legislative purpose to establish classes of recidivists to receive graded parole consideration. The classes were second offenders, third offenders and fourth offenders. There is no legislative requirement either as to the type of prior crime (such as felony or misdemeanor) or the term of sentence and, therefore, the artificial distinctions claimed by Respondent to exist in the cases of fourth offenders serving life in the State Prison under Section 11 and fourth offenders committed to County penitentiaries under Section 35 are superficial and bear no just and proper relation to the policy of the law.

There is not a single word in this entire statute which expressly authorizes parole consideration to fourth offenders serving life or fourth offenders who are committed to County penitentiaries. Yet Respondent frankly admits that parole consideration is granted to them under Sections 11 and 35. Under these circumstances, this statute as applied by the State authorities is clearly discriminatory and prejudicial to Petitioner. All are fourth offenders, but those under Sections 11 and 35 are favored with the *right* of parole consideration, whereas Petitioner, under Section 12(c), is denied the right to apply for parole and is compelled to serve the full maximum of his sentences.

Such legislation where patent discrimination exists on the face of the law and as applied by the State authorities contravenes the equal protection of the laws guarantee under the Fourteenth Amendment. This statute permits the State authorities to act arbitrarily and to discriminate

against members of the same class (fourth offenders), favoring those serving life or those committed to County penitentiaries and adversely treating those such as Petitioner against whom Section 12(c) is invoked.

Such legislation has been repeatedly condemned by this Court in the cases cited in the Statement as to Jurisdiction, to which may be added:

U. S. v. *Heinze,* 218 U. S. 532, 31 Superior Ct. 98, 54 L. Ed. 1139;

Howard v. *Kentucky,* 200 U. S. 164, 26 S. Ct. 189, 50 L. Ed. 421;

Smith v. *Board of Examiners,* 85 N. J. L. 46.

Conclusion

The questions here presented are substantial and in the public interest and should be reviewed and decided by this Court for the reasons stated in the Statement as to Jurisdiction and in this Reply. Respondent's Motion to Affirm is without merit and should be dismissed, and in the event that this Honorable Court should decline to review and decide the case after hearing and argument, it is requested that the judgment below be reversed for the reasons stated in the dissenting Opinion of Justice Heher.

Respectfully submitted,

SAMUEL KAGLE,
IVAN C. BASH,
Attorneys for Petitioner.